page 195) but apparently attached no significance whatsoever thereto in determining the nature of the Minister's functions in that case.

There would appear to be two stages in the making of an order of deprivation of citizenship under Article 24(2), namely:

(a) when the respondent satisfies himself of the matters required thereunder; and

(b) when he makes the order of deprivation.

Even if the respondent is satisfied at the first stage, he is not bound or obliged to proceed to the second stage and make an order of deprivation, as the operative word in the second limb of Article 24(2) is "may" and not "shall" or "must".

In the first stage, when he is in the process of satisfying himself, the respondent is acting in a quasi-judicial capacity. He has to evaluate the facts before him, perhaps consider the laws of the foreign country concerned and have regard to the report of the committee of inquiry. General considerations of policy do not in fact come in at this stage (*Maradana Mosque Trustees*[31] at page 23). In the second stage, after having satisfied himself he then assumes a very wide discretion in determining whether or not to make the order and at that stage it may well be that policy considerations come in (*R.* v. *Manchester Legal Aid Committee, Ex parte Brand (R.A.) & Co. Ltd.*,[20] at pages 428-9; *Durayappah* v. *Fernando*[16] — applied in *Jayawardane* v. *Silva*;[36] cf. *Shell Co. of Australia* v. *Federal Commissioner of Taxation*,[37] at page 298 and *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*,[38] at page 149).

It is not necessary that the respondent's function should be essentially of a judicial nature. If the exercise of a power affects the rights of an individual, no superadded duty to act judicially need necessarily be shown as the judicial element in the power can be inferred from the nature of the power itself (*Ridge* v. *Baldwin*,[15] at pages 72, 74-6 *per* Lord Reid; *Chief Building Surveyor* v. *Makhanlall & Co. Ltd.*,[39] at pages 120-1, 122).

It is accordingly my considered view, if it were necessary to classify according to accepted terminology his functions in the exercise of the power under Article 24(2), that the respondent is in fact acting, at the very least at one stage in the process, in a quasi-judicial capacity in making an order of deprivation of citizenship and not performing a purely ministerial or administrative act as submitted on his behalf. In any event, the respondent is under that constitutional provision determining the rights of individuals, and a vested and valuable right at that, and is also under a duty to act fairly. Orders therefore made by the respondent under Article 24(2) are amenable to the prerogative order of *certiorari*.

As an epilogue on this aspect I would venture to suggest that the time has possibly come for a serious re-examination of the question of the compartmental classification of the nature of functions and acts as judicial or quasi-judicial as opposed to administrative, executive or ministerial for the purposes of *certiorari* and also the necessity therefor in order to obviate difficulties such as those presented in this case in considering the availability of this remedy, and, in view of the ever broadening spectrum of administrative functions and powers, perhaps even for consideration of the expediency of adopting the position taken in Pakistan where the distinction between judicial and administrative acts for the purpose of judicial control in general and *certiorari* in particular has been expressly abandoned. In *Faridsons Ltd.* v. *Government of Pakistan*,[40] which was a case concerning the suspension of an import-registration certificate without giving the opportunity of a hearing to the applicant, who sought to quash the order, the Supreme Court of Pakistan held that *certiorari* lies in respect of judicial and administrative acts alike, and this position has been affirmed in successive decisions of the Supreme Court of Pakistan (*Abul A'la Maudoodi* v. *Govt. of West Pakistan*;[41] *University of Dacca* v. *Zakir Ahmed*;[42] *Mohd. Siddique* v. *Chief Settlement and Rehabilitation Commissioner*[43]).

The result:

I accordingly hold that an application for *certiorari* is not precluded in this case and in proceedings of this nature but whether it can avail the applicant is an entirely different matter which will have to be determined on the grounds and merits of the application.

I have considered and discussed a number of authorities which were not referred to by either side but I do not think any further argument is necessary on this score as the principles enunciated therein are well established and incontrovertible. I must nevertheless express my appreciation to both counsel for the careful arguments presented before me.

In the result and for the reasons I have given, the respondent's summons is dismissed with costs. I am now in a position to proceed to hear and determine the substantive application on its merits.

Summons dismissed.

Solicitors: *Mathuram & Co.*

MAK SIK KWONG v. MINISTER OF HOME AFFAIRS, MALAYSIA (NO. 2)

[O.C.J. (Abdoolcader J.) September 2, 1975]
[Ipoh — Originating Motion No. 34 of 1973]

Administrative Law — Certiorari — Application to quash order depriving applicant of his citizenship — Whether order made in excess of or without jurisdiction — Whether order made in breach of rules of natural justice — Federal Constitution, arts. 24(2), 27 & 28(3).

Constitutional Law — Citizenship — Deprivation of — Certiorari — Federal Constitution, arts. 24(2), 27 & 28(3).

Evidence — Proof of foreign law — Evidence Act, 1950, s. 45.

In this case the applicant applied by motion for an order of *certiorari* to quash the order made by the respondent under Article 24(2) of the Federal Constitution depriving the applicant of his citizenship of Malaysia on the ground that he had voluntarily claimed and exercised rights in a foreign country, being rights accorded exclusively to its citizens. The two main grounds of the application were (a) that the respondent in depriving the applicant of his citizenship had acted in excess of or without jurisdiction, that is, to say, *ultra vires* the powers given to him under the Constitution; and (b) that the respondent has so acted in breach of the rules of natural justice.

Held: (1) in this case even if the respondent had wrongly taken into account the applicant's entry into China in 1956 which he was precluded from doing by virtue of the provisions of Article 28(3), there was ample other evidence to justify the respondent's satisfaction that the applicant resided and attended educational institutions in China after Merdeka Day until

well into 1958 and was permitted to leave that country in October 1958 and thereby voluntarily claimed and exercised in China rights accorded exclusively to its citizens and available to him under the law of that country;

(2) there was no excess or lack of jurisdiction when the respondent made the order of deprivation, let alone a manifest defect of jurisdiction which would justify the court in issuing an order of *certiorari*;

(3) for the purposes of the exercise of his powers in making an order of deprivation under Article 24(2) of the Federal Constitution it is open to the respondent to take into consideration relevant confidential information such as intelligence reports and the like without disclosure to the citizen where such disclosure would be prejudicial to the public or national interest;

(4) the applicant was only entitled to his rights within the ambit of the specific constitutional provision in Article 27 of the Federal Constitution and these rights had been accorded to him;

(5) in the circumstances the motion for *certiorari* must be dismissed.

Cases referred to:-

(1) *Rex* v. *Nat Bell Liquors* [1922] 2 A.C. 128.
(2) *R.* v. *Bolton* [1841] 1 Q.B. 66.
(3) *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417.
(4) *R.* v. *Agricultural Land Tribunal for the South-Eastern Area, ex parte Bracey* [1960] 2 All E.R. 518.
(5) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 223n.
(6) *R.* v. *Fulham, Hammersmith and Kensington Tribunal, ex parte Zerek* [1951] 2 K.B. 1.
(7) *R.* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 K.B. 338.
(8) *R.* v. *Patents Appeal Tribunal, ex parte Baldwin & Francis Ltd.* [1959] 1 Q.B. 115.
(9) *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (1938) 59 C.L.R. 369.
(10) *R.* v. *Marsham* [1892] 1 Q.B. 371.
(11) *R.* v. *Paddington Valuation Officer ex parte Peachey Property Corporation Ltd.* [1966] 1 Q.B. 380.
(12) *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320.
(13) *Secretary of State for Employment* v. *ASLEF (No. 2)* [1972] 2 Q.B. 455.
(14) *Queen* v. *Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B.D. 313.
(15) *Queen* v. *Justices of the Central Criminal Court* (1886) 17 Q.B.D. 598.
(16) *Rex* v. *Ludlow, Ex parte Barnsley Corporation* [1947] 1 K.B. 634.
(17) *Armah* v. *Government of Ghana* [1968] A.C. 192.
(18) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.
(19) *Stocker* v. *Minister of Health* [1938] 1 K.B. 655.
(20) *Jacob* v. *Attorney-General* [1970] 2 M.L.J. 329.
(21) *Hongkong and Shanghai Banking Corporation, Ipoh* v. *Rent Tribunal for Ulu Kinta* [1972] 1 M.L.J. 70.
(22) *R.* v. *Birmingham Compensation Appeal Tribunal of Ministry of Labour and National Service, ex parte Road Haulage Executive* [1952] 2 All E.R. 100.
(23) *Sungei Wangi Estate* v. *Uni* [1975] 1 M.L.J. 136.
(24) *State of Orissa* v. *Bidyabushan Mohapatra* A.I.R. 1963 S.C. 779.
(25) *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109.
(26) *Brettingham-Moore* v. *Municipality of St. Leonards* (1969) 121 C.L.R. 509.
(27) *Furnell* v. *Whangarei High Schools Board* [1973] A.C. 660.
(28) *Local Government Boards* v. *Arlidge* [1915] A.C. 120.
(29) *R.* v. *Archbishop of Canterbury, ex parte Morant* [1944] 1 K.B. 282, 292.
(30) *Re K (Infants)* [1965] A.C. 201, 238.

ORIGINATING MOTION.

Mohideen Abdul Kader for the applicant.

Lim Beng Choon (Senior Federal Counsel) for the respondent.

Abdoolcader J.: 1. *PRELIMINARY:*

The curtain rises yet again upon this drama of deprivation of citizenship as the second act unfolds, as the result of a judgment* I delivered previously in this matter on preliminary issues of law raised on behalf of the respondent, on the substantive application in these proceedings for *certiorari*.

It is not necessary to recapitulate the background of this application as it is set out in my judgment on the preliminary points taken for the respondent in the first instance but it will suffice to say briefly that the applicant now seeks by way of motion for an order of *certiorari* to quash the order made by the respondent on April 5, 1973, under Article 24(2) of the Federal Constitution, depriving the applicant of his citizenship of Malaysia with effect from March 22, 1973, on the ground that he had voluntarily claimed and exercised in a foreign country, namely, Communist China, rights available to him under the law of that country, being rights accorded exclusively to its citizens.

2. *GROUNDS FOR RELIEF AND ISSUES INVOLVED:*

The applicant in the statutory statement annexed to his application for leave specifying the basis for the relief sought and served with the notice of motion in the substantive application mobilised eight distinct grounds diffused in the virtual pattern of an amorphous 8-channel network, but in presenting his case before me, Mr. Mohideen Abdul Kader for the applicant sensibly reduced them to two articulate grounds, namely, that the respondent in depriving the applicant of his citizenship has acted:

(i) in excess of or without jurisdiction, that is to say, *ultra vires* the powers given to him under the Constitution; and

(ii) in breach of the rules of natural justice.

3. *THE FIRST ISSUE: WHETHER THE RESPONDENT ACTED IN EXCESS OF OR WITHOUT JURISDICTION:*

(a) *Admissibility of extrinsic evidence:*

It is a settled rule that on all questions of jurisdiction and violation of the principles of natural justice evidence dehors the record can be taken while for all errors of law including error about the law of evidence (*Rex* v. *Nat Bell Liquors Ltd.*[1] at page 144 *per* Lord Summer), the record is the final authority. Where *certiorari* is applied for want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible but is as a rule necessary unless the jurisdictional defect is patent (*R.* v. *Bolton*;[2] *The Colonial Bank of Australasia* v. *Willan*;[3] *R.* v. *Agricultural Land Tribunal for the South-Eastern Area, Ex parte Bracey*[4] at page 520; *Anisminic Ltd.* v. *Foreign Compensation Commission*[5] at page 242 *per* Browne, J.). Indeed when the record is silent, evidence beyond the record may be essential (*Rex* v. *Nat Bell Liquors Ltd.*[1] at pages 153, 160), and in such cases oral evidence may also be admitted (*R.* v.

Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Zerek[6]).

Affidavits or oral evidence to show lack of evidence or concealed error of law on a matter within jurisdiction are however inadmissible (*Rex* v. *Nat Bell Liquors Ltd.*[1] at pages 155-6; *R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw;*[7] *R.* v. *Patents Appeal Tribunal, Ex parte Baldwin & Francis Ltd.*[8]).

(b) *The facts:*

The record in these proceedings is constituted by the notice dated September 20, 1971, issued by the Registrar-General of Citizens, Malaysia, under Article 27(1) of the Constitution and the order of deprivation made by the respondent on April 5, 1973, under Article 24(2). The applicant is not entitled to the transcript of the proceedings and the report of the committee of inquiry appointed under Article 27(2), and these are also not made available to the Court, no doubt in view of the relevant provisions of the Evidence Act, 1950 which I shall advert to presently and their confidential nature as unpublished records relating to affairs of State, the disclosure of which might be prejudicial to the public interest.

As an issue of jurisdictional defect is raised, affidavits were filed and admitted — two by the applicant and one by Tan Sri Datuk Ibrahim bin Ali, then Secretary-General of the Ministry of Home Affairs. The applicant's first affidavit contains some extraneous and irrelevant matter which I shall disregard but the undisputed facts disclosed by these affidavits appear to be that the applicant went to the People's Republic of China in September, 1956, without any travel or other documents, was allowed to enter that country in those circumstances and to reside and remain without any restriction, attended certain educational institutions there and was permitted to leave China, returning to and entering the then Federation of Malaya, in October, 1958, under a certificate of entry dated May 27, 1958, issued at the request of his mother by the Controller of Immigration, Malaya. All these facts were, according to the applicant's first affidavit, adduced in evidence before the committee of inquiry save that it is not clear whether evidence as to the certificate of entry issued by the Controller of Immigration, Malaya, and which is disclosed in the applicant's second affidavit was so adduced. The applicant in his second affidavit also affirms that he went to China for the sole purpose of furthering his education.

The only point that appears to be in dispute is an allegation by Tan Sri Datuk Ibrahim bin Ali in his affidavit that the applicant applied for exit from China in 1958 and was issued with an exit permit by the Chinese authorities for that purpose. This the applicant denies in his second affidavit but the fact still remains that he must have been permitted to and did leave China in October, 1958, in order to return to Malaya. Mr. Mohideen indeed concedes that there may well have been the necessity of obtaining permission from the Chinese authorities for the applicant to leave China in 1958 but he then raises the point which I shall revert to later as to whether this is or was a right accorded exclusively to citizens of China.

(c) *The law:*

There are two types of facts: facts which an authority (a term I use to include an inferior tribunal, administrative agency or other body exercising judicial or quasi-judicial functions) has undoubted power or jurisdiction to determine; and facts which must exist before an authority can exercise jurisdiction. The latter are known as jurisdictional or collateral facts, the existence of which is a condition precedent for the application of a statutory standard or the assumption of jurisdiction by an authority to decide the case on its merits. Thus, where an authority has power to requisition a vacant house, it is a condition precedent for requisitioning the house that it must be vacant which is a jurisdictional or collateral fact.

Power may or may not be given by a statute to an authority to determine the jurisdictional facts for itself. When no such power is conferred on an authority, the power of judicial review will extend to consideration of the evidence by the court upon its own independent judgment, as in the case of a statutory appeal, to determine the existence of the jurisdictional fact. On the other hand, an authority does not exceed its jurisdiction if it bases its decision upon an incorrect determination of the question which it is empowered or required and therefore has jurisdiction to decide and determine. It might be pertinent to note at this stage that Mr. Mohideen for the applicant in answer to a question posed by me concedes that there is a difference between failure to take into consideration a relevant fact and consideration of irrelevant matter and *a fortiori* wrong consideration of relevant matter in the course of an authority's determination. Review is primarily concerned with legality, *i.e.* with jurisdiction, and it cannot be said that it is *per se* an excess of jurisdiction to err on findings of fact or to interpret the law wrongly.

Jurisdiction or competence whose absence will render the entire proceedings null and void should be marked off from error which will even in the worst case render the proceedings only voidable. The decision of an authority may not be upset if there is merely a miscarriage or error in the course of the inquiry which does not go to jurisdiction (*Colonial Bank of Australasia* v. *Willan*[3] at page 444) — in other words, jurisdiction to decide a question may include jurisdiction to decide it incorrectly. As Dixon J. (later Chief Justice) put it in the Australian case of *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte,*[9] a clear distinction must be maintained between want of jurisdiction and the manner of its exercise — otherwise review for jurisdictional error will be equivalent to review on the merits.

Improper rejection of evidence or even the making of a decision which is not supported by evidence does not establish jurisdictional error (*Rex* v. *Nat Bell Liquors Ltd.*[1]). But if the rejection or inadequacy of evidence shows that the authority did not understand the nature of the test to be applied in making findings as to preliminary or collateral matters, even where the grant of power is in apparently subjective terms, then that may amount to jurisdictional error (*R.* v. *Mar-*

* reported at p. 168 *supra.*

sham;[10] *R.* v. *Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd.*[11]). As I pointed out in my earlier judgment, when jurisdiction to determine a matter is conferred upon an authority in subjective terms, the courts may be more reluctant to exercise their power to review the findings *de novo* (*Ashbridge Investments Ltd.* v. *Minister of Housing & Local Government;*[12] *Secretary of State for Employment* v. *ASLEF (No. 2)*[13]).

In *Colonial Bank of Australasia* v. *Willan,*[3] the Privy Council in effect held that objections on the ground of defect of jurisdiction may be founded on the character and constitution of the authority, the nature of the subject-matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give it jurisdiction. The objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the authority has erroneously found a fact which was essential to the validity of its order but which it was competent to try. Sir James Colville in delivering the judgment of their Lordships stated (at pages 442-3):

"... it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction'. There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the fact of the proceedings or brought before the superior court by affidavit, are extrinsic to the adjudication impeached. But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal, and the power to retry a question which the judge was competent to decide.

... an adjudication by a judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on *certiorari* quash such an adjudication on the ground that any such fact, however essential, has been erroneously found."

Lord Esher M.R. held to the like effect in *The Queen* v. *Commissioners for Special Purposes of the Income Tax*[14] (at pages 319-320):

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

Where an authority has jurisdiction to entertain an application, it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or in fact (*The Queen* v. *Justices of the Central Criminal Court;*[15] *Rex* v. *Ludlow, Ex parte Barnsley Corporation*[16]). Lord Reid stated in *Armah* v. *Government of Ghana*[17] (at page 234):

"If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction whether or not there is evidence to support a particular decision is always a question of law but it is not a question of jurisdiction. So if the courts could only interfere on the ground of lack of jurisdiction I do not see how they could interfere on the ground that there was no evidence to support the magistrate's decision."

But Lord Reid however sought to explain this statement in *Anisminic Ltd.* v. *Foreign Compensation Commission*[18] (at page 171) by stating that he was using the word 'jurisdiction' in the narrow original sense.

The general principle regarding the scope of judicial control is that questions of law are the specific province of the courts while questions of fact are for the administrative authorities. Once it is conceded that there is some evidence to support a finding of fact then the court has no jurisdiction to probe into its relative probative force and sufficiency (*Stocker* v. *Minister of Health,*[19] *Jacob* v. *Attorney-General*[20]). A court will not interfere with the decision of an authority merely on the ground of errors of fact although these may be apparent on the face of the record unless the facts go to the root of the authority's jurisdiction, though even then a court will be reluctant to resolve a conflict of the evidence in proceedings conducted by affidavits.

Jurisdiction to issue *certiorari* is supervisory and a court exercising such jurisdiction is not to act as an appellate authority, and will not review merely an erroneous finding of fact unless completely unsupported by evidence. The courts do not interfere with findings of fact of administrative authorities for if they were to do so the administrative authorities would become merely transmitting agencies of evidence to the courts and much of the advantage of administrative adjudication would be lost. The courts will not therefore normally intervene by way of *certiorari* on questions of fact unless a finding of fact by an administrative authority is based on no evidence which then is regarded as an error of law (*The Colonial Bank of Australasia* v. *Willan*[3] at pages 442-3; *Hong Kong & Shanghai Banking Corporation, Ipoh* v. *Rent Tribunal for Ulu Kinta & Others*[21] at page 71 *per* Ong C.J.; at page 72 *per* Ong Hock Sim F.J.; *Rex* v. *Nat Bell Liquors Ltd.*;[1] *R.* v. *Bolton*[2]). If there is any evid-

ence the court will not examine whether the right conclusion has been drawn from it (*R.* v. *Birmingham Compensation Appeal Tribunal of Ministry of Labour and National Service, Ex parte Road Haulage Executive*[22]).

An English court observed in one case that where the question of jurisdiction turns on a question of fact about which there was conflict of evidence they would generally decline to interfere through *certiorari* (*R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Zerek*[6] at page 11 *per* Devlin J.). The effect of the authorities appear to be that the appreciation of evidence is within the power of the authority and it cannot be touched on *certiorari* unless that error is apparent on the record. When the record is regular on its face and the authority had jurisdiction to make that decision, the decision cannot be quashed. And in cases where *certiorari* is excluded, provided the record as certified to the court discloses jurisdiction, it cannot be quashed by *certiorari* even if the record shows absence of evidence. In such cases the court can interfere only if the authority has made the decision without having any jurisdiction at all (cf. *Rex* v. *Nat Bell Liquors Ltd.*[1] at pages 151-2). It would appear therefore that any fault in the sphere of evidence can only amount to an error and cannot be termed a jurisdictional defect.

Mr. Mohideen admits that he rests his case in law on the first issue wholly on the basis of the House of Lords case of *Anisminic Ltd.* v. *Foreign Compensation Commission.*[18] I had occasion to observe in my judgment in *Sungei Wangi Estate* v. *Uni*[23] (at page 138) that the majority of the Law Lords in that case purported to adopt a very wide concept of excess of jurisdiction, repudiated the idea that the jurisdiction of an authority was determinable only at the outset of its inquiry and observed (albeit strictly obiter) that an authority having jurisdiction over a matter in the first instance might exceed its jurisdiction by breaking the rules of natural justice (at pages 147, 171, 195, 207, 215), applying a wrong legal test and answering the wrong question (at pages 171, 195, 210, 215), failing to take relevant considerations into account or basing the decision on legally irrelevant considerations (at pages 171, 195, 198, 215), and although they accepted the survival of the rule that an authority has power to err within the limits of its jurisdiction — a determination exhibiting such an error being merely voidable and not a nullity, so that it would still be a 'determination' which (under the Foreign Compensation Act, 1950, section 4) could not be questioned in any court (for instance, at page 195 *per* Lord Pearce), it is not easy to identify errors of law which, in the light of their analyses, would not be held to go to jurisdiction.

These observations on the very wide concept of excess of jurisdiction are however wholly and strictly obiter, since their Lordships held that the decision of the Foreign Compensation Commission was outside its jurisdiction because the Commission had misconstrued their terms of reference in applying to the claimants a test of eligibility that they were not required to comply with and had dismissed the claim on this preliminary point. However Lord Morris of Borth-y-Gest and all the members of the Court of Appeal ([1968] 2 Q.B. 862) agreed that if the Commission had erred, its error went to the merits and not to jurisdiction.

Mr. Mohideen in his final reply submits that the decision of the Privy Council in *Colonial Bank of Australasia* v. *Willan*[3] now must be considered as qualified by *Anisminic Ltd.* v. *Foreign Compensation Commission.*[18] I am astounded, to say the least, at the proposition so flagrantly flung in the face of the doctrine of *stare decisis* in the hierarchy of our Courts that a decision of the House of Lords, let alone *obiter dicta* at that, can be held to qualify, undermine or indeed virtually purport to overrule a decision of the Privy Council.

I would revert once again to my previous judgment on the preliminary issues in this matter when I pointed out that the Privy Council has held in *Colonial Bank of Australasia* v. *Willan*[3] that *certiorari* would issue in the face of a privative clause such as is enacted in section 2 of Part III of the Second Schedule to the Constitution purporting to preclude review by *certiorari* but only for a manifest defect of jurisdiction in the authority that made the order or for manifest fraud in the party procuring it. The ratio of this decision would appear to be that such a privative clause should not be interpreted so as to protect a void decision given manifestly outside jurisdiction, but that there is no justification for denying the protection of the privative clause to a valid decision given within jurisdiction, even if the decision is voidable.

The precedent laid down and established by the Privy Council in *Colonial Bank of Australasia* v. *Willan*[3] can be but a spring of mature wisdom from which I am bound to and must necessarily drink, but that apart, I respectfully agree with the *ratio decidendi* in that decision in its entirety. And indeed that is the position taken by the High Court in Australia where such a privative clause has only been disregarded if there is a manifest error of jurisdiction. The position in England is not dissimilar save that the clause is somewhat less effective in that the jurisdictional defect or fraud need not necessarily be manifest. Although the privative clause precluding review does not wholly abrogate the right to judicial review for the reasons I have given in my earlier judgment, some meaning must be given to its inclusion by the legislature and it therefore only seems proper that it should have a circumscribed connotation and result in restricting judicial review only to cases of manifest defect of jurisdiction as the Privy Council has held. 'Manifest' means, in my view, no less than self-evident or clear.

One last aspect on the law which I think I should deal with is the effect of a valid decision partly based on irrelevant considerations but grounded as well on relevant considerations. The general principle would appear to be that an administrative order based on both relevant and irrelevant or non-existent considerations is valid if the court is satisfied that the authority would have made the order even on the basis of the relevant and existing ground, and that the exclusion of the irrelevant or non-existent ground would not have affected the ultimate opinion or decision (*State of Orissa* v. *Bidyabushan Mohapatra*[24]). In cases of

preventive detention, however, a strict view is taken and only an unsubstantial ground being irrelevant would not affect the order.

(d) *The law applied to the facts:*

The respondent when making the order of deprivation had to be satisfied under the provisions of Article 24(2) of the Constitution that the applicant had voluntarily claimed and exercised in the People's Republic of China rights available to him under the law of that country, being rights accorded exclusively to its citzens.

Mr. Mohideen submits that the respondent must have evidence to this effect and the gist of his contention in this respect is that there was no such evidence as the applicant's entry into China in 1956 without travel or other documents, assuming that this was a right accorded exclusively to Chinese citizens, cannot be taken into consideration by virtue of Article 28(3) which provides that a person who on Merdeka Day (*i.e.* August 31, 1957) became a citizen by operation of law as having been a citizen of the Federation immediately before that day shall not be deprived of citizenship under Clause (1) or (2) of Article 24 by reason of anything done on or before that day. And with regard to the applicant's return to Malaya in 1958, he submits that this was effected only under and by virtue of the certificate of entry issued by the Malayan Immigration Department. He therefore submits that the applicant had not voluntarily claimed and exercised any rights referred to in Article 24(2) and there was accordingly no evidence for the respondent to be satisfied when making the order of deprivation.

I pointed out to counsel however in the course of his submissions that assuming that this was indeed so there still remains the matter of the applicant's unrestricted residence in China after Merdeka Day, his exercise of rights of education and attendance at educational institutions in that country and the fact that although he may have entered Malaya in 1958 under the certificate of entry issued by the Malayan Immigration Department, he must, in the first instance, have been permitted to leave China before he could re-enter this country, reminding him of his concession regarding the necessity of such permission which I have adverted to earlier in dealing with the facts, and that all these are certainly matters which were open to the respondent to take into consideration for the purposes of Article 24(2).

Mr. Mohideen thereupon submits that there was no evidence that these matters were or are in fact rights accorded exclusively to citizens of China and suggests that I should take judicial notice of the law of China, but when I evinced horror at the suggestion and referred him to the provisions of section 45 of the Evidence Act, 1950 he resiled and promptly applied for an adjournment to file affidavits by experts on Chinese law as to rights accorded exclusively to Chinese citizens and specifically to show that attending educational institutions and entering China without the necessary documents and residing there as well as leaving that country with the permission of its authorities are not such rights.

I refused the request for an adjournment for this purpose for two reasons. Firstly, the applicant obtained leave in these proceedings on November 20, 1973, and filed the substantive motion on December 3, 1973. The applicant therefore has had some twenty months at least to do what he thinks should now be done. Secondly, foreign law on a particular topic is a question of fact. An opinion upon a point of foreign law can be proved by evidence of experts (section 45(1) Evidence Act) and in this connection statements as to any law of any foreign country contained in law books, printed or published under the authority of the Government of that foreign country, are relevant (section 38 Evidence Act). The matters to be considered by the respondent under Article 24(2) are pure questions of fact and asking me to entertain evidence in this connection is, in my view, tantamount to asking the court to sit on appeal against the respondent's findings and re-try the matters entrusted to his discretion by the Constitution and his determination thereon. It is not the function or within the jurisdiction of the court to do so. If the respondent erred at all in considering Chinese law for the purposes of his determination in this matter, he erred only on a question of evidence and fact resulting at the most only in an evidential error of law not going to jurisdiction, but there is no indication that he did indeed do so.

If I were to allow such an application then the situation would not inconceivably develop into a snowballing process with the respondent filing counter-affidavits by other experts as to the law of the People's Republic of China at the relevant time with the further possibility of affidavits in reply thereto perhaps *ad infinitum*, and it would not be inconceptible or unusual for experts to differ in their opinions particularly on a matter of construction or interpretation of the foreign law in question. This would virtually result in a full scale hearing culminating in effect in the Court donning the mantle and assuming the functions of the respondent in the exercise of his powers and duties under the Constitution and perhaps ultimately substituting its decision for his. The respondent had evidence of the applicant's residence and education in China without restriction and his final exit therefrom. Whether those facts were sufficient for the respondent to have arrived at his satisfaction for the purposes of Article 24(2) was a matter entirely for him to decide. And, in any event, as I have stated, for all errors of law including error about the law of evidence the record is the final authority and extrinsic evidence, oral or affidavit, is inadmissible.

It is my considered view in the light of the law I have adumbrated that assuming that there is any error of law in this matter it was made within jurisdiction, but I find there is in fact no such error of law. The affidavit filed in these proceedings for the respondent's case was made by the then Secretary-General of the Ministry of Home Affairs and not the respondent himself who made the order under Article 24(2). There is therefore no conclusive and clear evidence that the respondent did take into account the applicant's entry into China in 1956 which he is precluded from doing by virtue of the provisions of Article 28(3).

In any event, this point would seem to be academic as there appears to be ample other evidence to justify the respondent's satisfaction that the applicant resided and attended educational institutions in China after Merdeka Day until well into 1958 and was permitted to leave that country in October, 1958, and therefore voluntarily claimed and exercised in China rights accorded exclusively to its citizens and available to him under the law of that country, again a question of fact. Assuming therefore that the respondent did indeed take into account the applicant's entry into China in 1956, it is abundantly clear that his order would still be valid as it was based on the ground of other relevant and pertinent matters as well and I am clearly satisfied that the exclusion of the irrelevant consideration would not have affected his ultimate decision. I have already stated that the applicant's return to Malaya in 1958 under the Malayan Immigration certificate of entry does not detract from the fact that he must in the first instance have been permitted to leave China and did do so.

In the result I find that there was no excess or lack of jurisdiction when the respondent made the order of deprivation as contended on behalf of the applicant, let alone a manifest defect of jurisdiction as required by the rule in *Colonial Bank of Australasia* v. *Willan*.[3]

4. *THE SECOND ISSUE: WHETHER THE RESPONDENT ACTED IN BREACH OF THE RULES OF NATURAL JUSTICE:*

Mr. Mohideen contends that if the respondent was satisfied on facts other than those disclosed in the affidavits, then he was in breach of the rules of natural justice, that is to say, the right of the applicant to be heard. He argues that if the acts disclosed in the undisputed facts which were in fact adduced in evidence before the committee of inquiry do not satisfy the ground required under Article 24(2), then either the respondent had reference to other facts or he was acting callously without paying regard to the provisions of the Constitution, and that if the respondent did consider other matters which formed the basis for his satisfaction and which were not disclosed to the applicant during the course of the inquiry before the committee constituted under Article 27(2), then the respondent has acted in breach of the rules of natural justice.

It will suffice for me to express myself on this contention, perhaps somewhat trenchantly, by stating that in my view and with respect to counsel it has as much merit as can be counted upon the fingers of an armless man. This issue and the premise on which it is based are purely speculative, wholly grounded on assumptions with no basis whatsoever and unsupported by an *iota* of substance or evidence. I would have thought that if the facts disclosed no ground for satisfaction on the part of the respondent for the reasons advanced on behalf of the applicant on the first issue, then he would have to stand or fall on that issue on the law. It is not open to him to assume in the alternative that the respondent has taken into account extraneous considerations merely by contending to that effect as a secondary line of attack without any substantiation and based on conjectural reasoning. This contention is in my view tantamount to a mere allegation of bad faith without any evidence or proof in support.

As the question of the application of the rules of natural justice has been raised, it may perhaps not be amiss for me to make some observations on this matter. It is a misconception to consider the principles and rules of natural justice when applicable as rigid, absolute and unbending in every conceivable case. The rules of natural justice are not inflexible principles but may vary in their ambit in the context of their application. Tucker L.J. in *Russell* v. *Duke of Norfolk*[25] (at page 118) pointed out that there are no words which are of universal application to every kind of inquiry and that the requirements of natural justice must depend on the circumstances of each particular case, the nature of the inquiry, the rules under which the authority is acting and the subject-matter under consideration.

I have indicated quite clearly in my previous judgment on the preliminary issues in this matter that the Constitution provides by Article 27 a scheme for the oblique application of the rules of natural justice and the concepts of fairness and impartiality by the intercalation at the instance of the citizen of (and, it is significant to note, at the discretion of the respondent in any other case where there is no such requisition by the citizen in which event the respondent is under no such obligation to refer to) a committee of inquiry to afford him the opportunity of making representations and being heard before the respondent arrives at his final satisfaction and makes an order of deprivation.

That is the specific provision made by the Constitution for the application of the rules of natural justice and to read more into it would be to write more into the Constitution than is enacted. It is not the function of the court to redraft the Constitution. In *Brettingham-Moore* v. *Municipality of St. Leonards*[26] in which the Tasmanian Municipalities Commission made a report to the Governor as to municipal boundaries without hearing the plaintiffs who were various municipal councils, the High Court of Australia said (at page 524):

> "The legislature has addressed itself to the very question and it is not for the court to amend the statute by engrafting upon it some provision which the court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material."

Mr. Mohideen requests me to compare the provisions of Article 27 with those of Article 151(3) which deal with preventive detention. I think the contrast misconceived as Clause (3) of Article 151 which enacts that the Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest must be read in the light of Clause (1)(a) of that Article which specifically provides that the detaining authority shall as soon as may be inform the detenu of "*the grounds* for his detention *and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be*" (emphasis supplied).

Article 27 expressly provides for a scheme requiring notice and inquiry by a duly constituted committee which has to hold an inquiry *in such manner as the respondent may direct* (emphasis supplied) and submit its report to the respondent who shall then have regard thereto in determining whether to make an order under Article 24(2). I made it clear in my previous judgment on the preliminary issues that the respondent is only bound to consider the report but not to act on it. No procedural requirement for any other purpose is imposed and the applicant is only entitled to his rights within the ambit of that specific constitutional provision (cf. *Furnell* v. *Whangarei High Schools Board*[27]). All reasonable information as disclosed in the facts which I have dealt with were adduced in evidence at the inquiry on the applicant's own admission in his first affidavit to enable him to make representations in regard thereto.

I would add that there is an exception to the rules of natural justice where to impose an obligation to disclose relevant information to the party affected would be prejudicial to the public interest, and the rule of *audi alteram partem* may therefore be modified by legislation or judicial decision for the protection of particular facets of the public interest, for example, secret aspects of national policy, information pertaining to the detection of crime or other confidential information relating to government.

The House of Lords held in *Local Government Board* v. *Arlidge*[28] that a government department determining a housing appeal was not obliged to divulge one of its inspector's reports to the appellant, even though the report might well have contained relevant statements prejudicial to his case which he might have wished to controvert. This conception of secrecy in the public interest extends also to non-administrative matters (*R.* v. *Archbishop of Canterbury, Ex parte Morant.*[29] In *Re K. (Infants),*[30] a child custody case in which the House of Lords refused disclosure of confidential reports made to the court by the Official Solicitor because their disclosure to the parents concerned might damage children whose welfare it was the paramount duty of the court to protect, Lord Devlin in effect stated (at page 238) that common law duties to abide by the rules of natural justice were not ends in themselves, and where they did not serve the ends of justice, they could not be allowed to "become the master instead of the servant of justice".

Sections 123, 124 and 162 of the Evidence Act, 1950 provide for the protection from disclosure of any unpublished official records relating to affairs of State or any evidence derived therefrom and confidential official communications the disclosure of which would be detrimental or prejudicial to the public interest, and are consonant with and in effect constitute a statutory crystallization of the exception to the rules of natural justice I have referred to.

It is accordingly my view that for the purposes of the exercise of his powers in making an order of deprivation under Article 24(2) it is open to the respondent to take into consideration relevant confidential information such as intelligence reports and the like without disclosure to the citizen where such disclosure would be prejudicial to the public or national interest.

5. *CONCLUSION:*

I did indicate in my judgment on the preliminary issues in this matter that although in proceedings of this nature an application for *certiorari* is not precluded, the question whether it can avail the aggrieved applicant is an entirely different matter dependent on the grounds and merits of any particular application. It would appear that in the scheme of things provided for deprivation of citizenship, it would be no easy task to establish grounds for relief by way of *certiorari* save in clear or exceptional cases such as where an order of deprivation sets out particulars wholly unrelated to the ground on which they purport to be founded or, for instance, where such an order purports to be made against a citizen by operation of law on grounds set out in Article 25 of the Constitution applicable only to citizens by registration or naturalisation.

However, let me say this. Although he may have failed to achieve his primary objective and succeed in the relief sought to restore his status as a citizen, the applicant, or at least perhaps counsel representing him, can, I trust, take solace and satisfaction in the fact that he has not been denied access to the machinery of justice and in particular to the facilities of the engine of judicial review in having had the merits of his case fully ventilated in law without rejection in limine, and, most of all, that these proceedings which bear his name and more especially the determination of the preliminary issues dealt with in my previous judgment in this matter have enabled the court to restate in clear and unmistakable terms that it will not hesitate to entertain grievances allegedly arising out of administrative or executive action notwithstanding purported statutory preclusion of review and to amply demonstrate that ours is a system of law which no expediency can warp and no power can abuse with impunity.

I should add this. I have once again had to consider and deal with several aspects of the law in this matter and many authorities which were not mooted in argument before me by either side, but I found this necessary as it is my duty to expound the relevant principles applicable in this case and leave no hiatus in the law and reasoning leading to the conclusion I have come to. This does not however in my view necessitate any further argument as it does not affect the basic propositions and contentions put forth and fairly argued on both sides but only provides reinforcements to elucidate and elaborate on the fundamental issues involved which I have endeavoured to deal with somewhat exhaustively as I thought it might be useful to do so in view of the dearth of local authority on the points raised on this motion.

In the event *certiorari* is refused. The motion is dismissed. The respondent will have the taxed costs of these proceedings.

The curtain now drops in this matter and, I trust, for good this time.

Certiorari refused. Motion dismissed.

Solicitors: *Mathuram & Co.*